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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of Part 90 of the )  
Commission's Rules )  
Governing Extended )  
Implementation Periods )

PR Docket No. 92-210

RM-7974

To: The Commission

COMMENTS  
OF THE  
NATIONAL ASSOCIATION OF BUSINESS  
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER"), pursuant to Section 1.415 of the Commission's Rules and Regulations, 47 C.F.R. § 1.415, hereby submits these Comments in response to the Notice of Proposed Rule Making ("Notice") adopted by the Commission in the above-styled proceeding.<sup>1</sup>

I. BACKGROUND

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of manufacturers, vendors and service providers as well as large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses. NABER has five membership sections representing Users, Private Carrier Paging licensees, Radio Dealers, Technicians and Specialized Mobile Radio operators. NABER comprises over 6,000 of these businesses and service providers holding thousands of

<sup>1</sup> Notice of Proposed Rule Making (FCC 92-429), PR Docket No. 92-210, 57 FR 49058 (October 29, 1992).

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licenses in the private land mobile services.

For the past 19 years, NABER has been the recognized frequency coordinator in the 450-470 MHz and 470-512 MHz bands for the Business Radio Service. NABER is also the Commission's recognized frequency coordinator for the 800 MHz and 900 MHz Business Pools, 800 MHz "old" conventional channels for Business eligibles and conventional SMR Systems, and for the 929 MHz paging frequencies.

In this Notice, the Commission proposes to amend Section 90.629 of the rules to (1) extend the rule's applicability to Specialized Mobile Radio ("SMR") Category applicants, (2) lengthen the "slow growth" period for three to five years, (3) eliminate the fleet-size requirement for qualification for an extended implementation period, and (4) eliminate the annual reporting requirements. Section 90.629 currently permits an applicant seeking to license Public Safety, Industrial/Land Transportation, Business and General Category frequencies to request a maximum of three years in which to construct its conventional or trunked system upon a showing that warrants the extended period. The applicant must either show that (1) the proposed system will serve a large fleet and will involve a multi-year cycle for planning, approval, funding, purchase and construction; (2) the proposed system will require longer than eight months to place in operation because of its purpose size or complexity; (3) the proposed system is to be a part of a coordinated or integrated area-wide system that will require more than a year to plan approve, fund and construct, or (4) the applicant is a local governmental agency and

demonstrates that it is required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of the proposed system.

Recently, the Commission has received and granted a number of advanced, digital, wide-area SMR systems that have sought, by waiver, an extended period of time to construct these systems because of the complexity and expense of the systems. The Commission believes that these applicants have as compelling need for the extended implementation schedules as non-SMR applicants which are currently eligible. Accordingly, the Commission proposes to expand the eligibility of Section 90.629 to include SMR frequencies. Further, the Commission proposes to extend the time period by which the construction may be extended to five years from three years.

The Commission also proposes to modify the rule to eliminate the requirement that the system serve a fleet of at least 200 mobiles. The Commission asserts that the number of mobiles to be operated on a system has little or no relation to the amount of time an applicant needs to construct the base stations associated with the system.

Additionally, the Commission proposes to expand its rule to include any entity, not just local governments, that may be required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of a proposed system. Further, the Commission proposes to clarify the rule to state that trunked systems authorized an extended implementation period are only

required to load their systems to the same level as those licensees of trunked systems not authorized an extended implementation period (i.e. 70 mobiles per channel within 5 years of authorization.) Finally, the Commission proposes to modify both Sections 90.629 and 90.631 to increase the number of channels a licensee may retain should a recovery action be taken by the Commission for a failure to load.

## II. COMMENTS

NABER generally supports the Commission's proposed modifications to Section 90.629. However, the Commission's modification of Section 90.629 to permit SMR licensees to obtain extended construction periods for their wide-area systems waiver without similar relief under Section 90.631 is incongruous.<sup>2</sup> Specifically, Section 90.631 does not provide for SMR wide-area systems. Therefore, Section 90.631 must also be modified in order to permit SMR applicants for extended implementation of a wide-area system to acquire a wide-area SMR license, and NABER requests that its Petition for Rule Making to amend Section 90.631 be included in this proceeding.

NABER is concerned that the Commission's proposal to modify Section 90.629 to include SMR frequencies and allow construction periods for a maximum of five years may well serve to reduce the spectrum efficient use of the 800/900 MHz bands without safeguards

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<sup>2</sup>NABER filed a Petition for Rule Making requesting the Commission initiate a rule making proceeding to modify Section 90.631(g) and (h) to include both Business Radio and SMR service eligibles to license wide-area private land mobile radio system.

to prevent the warehousing of spectrum. NABER recognizes that the Commission routinely extends the implementation periods for Public Safety radio service eligibles and certain Industrial/Land Transportation radio services eligibles, such as utilities, from three years to as much as seven years. NABER does not disagree with the Commission's actions where the entities seeking the extensions have shown substantial progress towards the original benchmarks.<sup>3</sup> However, NABER urges the Commission to scrutinize the extended implementation requests to ensure that the reasons stated for the longer construction periods are genuine and verifiable.

For example, many of the SMR licensees who recently have sought an authorization for an advanced, digital, wide-area SMR systems are unable to initiate construction because of the unavailability of equipment. Nevertheless, failure to license the wide-area systems immediately may impede development of these highly spectrum efficient systems. Even if the equipment were available tomorrow, the cost of the equipment and the number of stations that generally must be constructed cannot reasonably or realistically be constructed within one year of the initial grant. For the most part, most of the channels sought to be operated as part of digital conversions have already been constructed in an

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<sup>3</sup>NABER is aware of several instances relating to Public Safety entities where the entity did not have either the budget or the authority to proceed with implementation of a 800 MHz system. Nevertheless, the entity licensed a trunked 800 MHz system on non-Public Safety channels, requested "slow growth" status, met none of its benchmarks, and was allowed to extend the construction of the system beyond the three year period. Thus, other applicants seeking 800 MHz systems were unable to access these frequencies because of the continued extensions.

analog mode. Therefore, these channels are already in use, and the issue of warehousing the spectrum in these areas is less problematic. NABER, therefore, concludes that this justification warrants an extended period of time to construct the newly-granted system.

On the other hand, the Commission has granted extended implementation schedules for trunked systems, with only one transmitter site and five channels assigned, for a period of three years without any more than the mere assertion from the applicant that the system will take more than one year for planning, approval, funding and purchasing of the proposed system. Without more justification, NABER believes that such extension for SMR applicants may result in a large number of speculative filings. Therefore, NABER recommends that the Commission require applicants to demonstrate the need for the extended implementation period. Such evidence could include the number of base stations involved in overall implementation of the system and the number of mobiles to be purchased, the estimated cost of purchasing, constructing and installing the base stations and the purchase and installation of the mobile units, a certification that the entity has authority to initiate the project, evidence to support the delineated service area, and similar documentation. Requiring a prima facie demonstration of the need will preclude applicants from submitting speculative applications seeking the maximum extension for construction. Accordingly, NABER urges the Commission to ensure that sufficient factual information has been disclosed by an

applicant requesting an extended implementation period that reasonably supports the period of time sought to construct and place a system in operation.

NABER notes that the Commission "proposes, therefore, that applicants that will require less than five years to construct and place their systems in operation request only extended implementation periods that are appropriate to their needs."<sup>4</sup> However, there is no language to that effect in the proposed modifications to Section 90.629 nor are there any sanctions associated with a failure to abide by this "proposal." NABER suggests that the Commission must place the burden on the applicant to provide substantial evidence of the need for the extended implementation period, or applicants will routinely seek the maximum time permitted to construct and place a system in operation. Due to the lack of sanctions imposed against a licensee for failure to construct and load a system, the applicant has no incentive to propose an implementation schedule of a lesser period than the rules provides.

Additionally, NABER believes that the Commission must require that all base stations are constructed within the initial five-year term of the license and that the full complement of mobile loading is implemented within the initial five-year term of the license. NABER opposes the Commission authorizing an entity more than five years to load its system.

The Commission also has proposed, without comment in the text

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<sup>4</sup> Notice at para. 4.

of the Notice, a change to both Sections 90.629 and 90.631 to permit a licensee to retain one channel for every 100 mobiles loaded, plus one additional channel, should the licensee fail to meet the loading criteria of Sections 90.629(b) and 90.631(b). This modification to Sections 90.629 and 90.631 appears to codify the Commission's current practice in enforcing its rules when a trunked system has failed to meet the minimum loading criteria at the end of the initial license term. Generally, the Commission in implementing the recovery action renews the number of channels for every 100 mobile units licensed and one additional channel that has more than one mobile but less than 100 mobile units licensed.<sup>5</sup> Should NABER's understanding be correct as to the underlying purpose for this proposed modification, NABER does not oppose the Commission's adoption of the modification. NABER, however, requests that the Commission to discuss in more detail the purpose and the impact of these proposed rule changes. For example, if a licensee has only 2 mobiles licensed and operating on its 5-channel trunked system at the end the initial five-year license term,<sup>6</sup> it is unclear as to whether the Commission recover three

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<sup>5</sup> As an example, the Commission would permit a licensee of a five-channel system to retain two channels at the end of the initial license term of the authorization when the mobile loading is between 101 and 199 units. Currently, Sections 90.629(b) and 90.631(b) state that "authorization for trunked channels not loaded to 100 mobile stations cancels automatically" (47 C.F.R. § 90.629(b)) and "authorization for channels not loaded to 100 mobiles per channel cancel automatically" (47 C.F.R. § 90.631(b)).

<sup>6</sup> With the presumption that all channels in the licensee's category are assigned in the system's geographic location and the authorization was issued prior to June 1, 1993.



channels or four channels. NABER perceives the proposed changes to each of the rules to permit the retention of only one channel in this situation. NABER requests that the Commission specify its intention on this proposed change to the rules.

Finally, the Commission proposes to eliminate the annual reports currently required under Section 90.629. NABER concurs with the Commission's assessment that such reports are burdensome, and notes that the filing of these reports annually appear to be the exception rather than the rule. NABER does not oppose the elimination of these annual reports, but would request the Commission clarify the applicability of the Finder's Preference program to systems' authorized extended implementation schedules. In the past, there has been some confusion as to when a Finder's Preference Request may be filed in connection with a failure to abide by an authorized implementation schedule -- whether within six months after the failure to meet a construction and operational benchmark, a party may file for a preference for the affected channel(s) or whether a party must wait six months after the expiration of the authorized extended implementation schedule.

Proposed Section 90.629(b) states that "[i]f the licensee fails to construct and place its system in operation within the authorized implementation period and in accordance with the approved implementation schedule, all channels not constructed and placed in operation at the base station locations identified in the implementation schedule and all base stations not constructed and placed in operation in accordance with the implementation schedule

will be deleted from the licensee's authorization." NABER concludes that the specificity of the Commission's proposed language would permit a Finder's Preference Request to be filed 180 days after a failure to meet a construction/operational benchmark. The Commission may wish to address this issue in its final action in this proceeding.

### III. CONCLUSION

**WHEREFORE,** the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

**NATIONAL ASSOCIATION FOR BUSINESS  
AND EDUCATIONAL RADIO, INC.**

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